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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

10 ANA SUDA and MARTHA HERNANDEZ,) CV-19-10-GF-BMM
11 Plaintiffs,)
12 v.) **DEFENDANT CBP**
13 UNITED STATES CUSTOMS AND) **AGENT PAUL O'NEILL'S**
BORDER PROTECTION; CBP) **REPLY BRIEF IN**
14 COMMISSIONER KEVIN K. MCALEENAN,) **SUPPORT OF 12(b)(6)**
in his official capacity; CBP AGENT PAUL) **MOTION TO PARTIALLY**
15 O'NEILL, in his individual and official) **DISMISS PLAINTIFFS'**
capacities; and JOHN DOES 1-25, in their) **COMPLAINT**
16 individual and official capacities,)
17 Defendants.)

18 COMES NOW, Defendant Paul O'Neill ("Mr. O'Neill"), by and through
19 his attorneys of record, Reep, Bell, Laird & Jasper, P.C., and pursuant to
20 Rule 12(b)(6) of Federal Rules of Civil Procedure respectfully submits his

1 reply brief in support of his motion to partially dismiss the Plaintiffs'
2 Complaint.

3 **ARGUMENT**

4 Mr. O'Neill, in his individual capacity, has moved this Court for an
5 order dismissing the Plaintiffs' claims against him for declaratory and
6 injunctive relief. In response, the Plaintiffs state they "have not sought such
7 relief against Defendant O'Neill in his individual capacity, only in his official
8 capacity" and "[t]o the extent the Complaint might be read to include such
9 prospective claims against him individually" they "have no objection to the
10 dismissal of those claims only as to Defendant O'Neill in his individual
11 capacity." Doc. 40 at 3. Therefore, Mr. O'Neill's partial motion to dismiss
12 should be granted, and the claims for declaratory and injunctive relief
13 against him should be dismissed.

14 To ensure the record is clear, Mr. O'Neill must address the contention
15 made in Plaintiffs' response brief that he "does not contest that Plaintiffs'
16 constitutional rights were violated." *Id.* at 2. This is a gross
17 mischaracterization of Mr. O'Neill's position. In his opening brief, Mr.
18 O'Neill specifically states "[f]or the purposes of this motion, Mr. O'Neill
19 takes the Plaintiff's Complaint as *alleged*, withholding any position on the
20 veracity of the allegations contained therein." Doc. 31 at 3:6–8 (emphasis

1 original). Mr. O'Neill has applied the legal standard for Rule 12(b)(6)
2 motions, which is to take the allegations of the complaint as alleged and
3 assert grounds for dismissal even if they were true. *Ashcroft v. Iqbal*, 556
4 U.S. 662, 678 (2009). Mr. O'Neill does not concede or admit that a
5 violation of the Plaintiffs' constitutional rights occurred.

6 To the extent the Plaintiffs are attempting to argue for a tacit
7 admission to the allegations contained in their complaint, Mr. O'Neill makes
8 no such admission, expressly or impliedly.

9 **CONCLUSION**

10 Based on the Plaintiffs own statements, Mr. O'Neill's partial motion to
11 dismiss should be granted.

12 DATED this 18th day of July, 2019.

13 REEP, BELL, LAIRD & JASPER, P.C.

14 By: /s/ Cory R. Laird
15 Attorneys for Defendant Paul O'Neill

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- Defendant CBP Agent Paul O'Neill's Reply Brief In Support Of 12(b)(6) Motion To Partially Dismiss Plaintiffs' Complaint. Page 4.

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13 DATED this 18th day of July, 2019.

14 REEP, BELL, LAIRD & JASPER, P.C.

15 By: /s/ Cory R. Laird
16 Attorneys for Defendant Paul O'Neill

1 **CERTIFICATE OF COMPLIANCE**

2 The undersigned hereby certifies this Brief complies with LR
3 7.1(d)(2)(B). This reply brief contains 339 words, excluding the caption,
4 Certificate of Service and the Certificate of Compliance. The word count
5 function in the word processing software used to prepare this reply brief
6 was relied upon for this calculation.

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8 By: /s/ Cory R. Laird
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